

D.P.U. 92-166-A

Petition of CMS Generation Co. and Montvale Energy Associates, L.P. to the Department of Public Utilities, pursuant to 220 C.M.R. § 8.07(2), regarding the review of project scoring and designation by Boston Edison Company of the Award Group for RFP 3.

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I. INTRODUCTION

On January 31, 1992, CMS Generating Company and Montvale Energy Associates, L.P. (jointly, "CMS") submitted a proposal for a Woburn Energy Project ("Project") in Boston Edison Company's ("BECo's") third request for proposals ("RFP 3") from non-utility generators. On July 3, 1992, CMS filed a petition with the Department of Public Utilities ("Department"), pursuant to 220 C.M.R. § 8.07(2), alleging that BECo erred in calculating the score that BECo identified for the Project and also erred in calculating the scores of other RFP 3 bidders. On August 31, 1993, the Department issued an Order denying its July 3, 1992 petition. CMS Generation Company and Montvale Energy Associates, L.P., D.P.U. 92-166 (1993). On October 13, 1993, CMS filed a Motion for Reconsideration Out-of-Time ("Motion") of the Department's August 31, 1993 Order. On October 25, 1993, Altresco Financial, Inc. ("Altresco"), a limited participant in the subject proceeding, filed an Opposition ("Opposition") to CMS' Motion. No other briefs were submitted in this matter.

II. THE STANDARD OF REVIEW

The Department's review of the Motion occurs pursuant to 220 C.M.R. § 1.11(10), which states:

(10) Motion for Reconsideration. Within twenty (20) days of service of a final Department Order, a party may file a motion for reconsideration. Parties to the proceeding shall be afforded a reasonable opportunity to respond to a motion for reconsideration.

¹ The question of whether CMS has legal standing to file an untimely motion for reconsideration necessarily precedes an inquiry of the motion on the merits. Because CMS filed the Motion 43 days after the Department's August 31, 1993 final Order, the Department is required to determine if CMS has provided sufficient basis for the of our disposition in this case, we do not need to apply the well-established standard of review for motions for reconsideration before the Department. We note, however, that CMS' Motion does not address or apply this standard of review. Western Massachusetts Electric Company, D.P.U. 92-8C-B at 8 n.8 (1993).¹

The language cited above sets forth no exceptions to or grounds for waiving the twenty-day requirement. However, the Department's procedural regulations at 220 C.M.R. § 1.01(4) permit the Hearing Officer or Commission to waive the regulations upon a showing of good cause, provided such is not contrary to statute.

Although the regulations do not contain a definition of good cause, the Department recently has defined good cause as follows:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.

Boston Edison Company, D.P.U. 90-335-A, at 4 (1992) ("Boston Edison"). See also Ruth C. Nunnally, d/b/a L & R Enterprises, D.P.U. 92-34-A, at 3 (1993) ("Nunnally").

III. POSITIONS OF THE PARTIES

We address here those arguments in CMS' Motion and Altresco's Opposition which relate to the question of whether good cause exists to consider the Motion on the merits.

A. CMS

CMS argues that good cause exists to reach the merits of CMS' Motion. CMS indicates that CMS' attorney of record in this proceeding as of February 5, 1993 left the employment of the law firm representing CMS on July 9, 1993 (Motion at 7-8). CMS states that it learned of the Department's August 31, 1993 Order, which was sent to the attorney of record at the same law firm, after the twenty-day period for filing a motion for reconsideration had expired (id. at 8). CMS points out that it filed the subject Motion

promptly after becoming aware of the Order (id.).

B. Altresco

Altresco opposes CMS' Motion on three grounds. First, Altresco argues that the Department lacks jurisdiction to grant a waiver to 220 C.M.R. § 1.11(10), because doing so would contravene G.L. c. 25, § 5 by renewing CMS' appellate rights beyond the timeframe specified by that statute (Opposition at 2-4). Second, Altresco contends that good cause is not present for granting an waiver of 220 C.M.R. § 1.11(10) because (a) the Department served a copy of the Order as CMS counsel directed, (b) the then-appearing counsel did not withdraw his appearance, and (c) CMS and its law firm did not safeguard against the possibility of delay from the attorney of record's departure from the firm (id. at 5-6). Third, Altresco contends that granting the requested waiver would prejudice Altresco by causing further delay, uncertainty, and expense to the Altresco project (id. at 6-7).

IV. ANALYSIS AND FINDINGS

Before the Department's standard regarding good cause is applied, the Department must first address Altresco's argument regarding the Department's jurisdiction to waive the twenty-day requirement of 220 C.M.R. § 1.11(10). As stated above, Altresco maintains that the Department's jurisdiction does not allow it to waive the twenty-day deadline for filing a motion for reconsideration. We are not persuaded by this argument. First, CMS expressly requests waiver from provisions in the Department's regulations, and these regulations may be waived pursuant to 220 C.M.R. § 1.01(4) if its requirements are met. Although CMS may endeavor to seek appeal if a waiver were granted, as Altresco contends, the Department does not speculate on the legal merits of this strategy. We point out, however, that appeals

and motions for reconsideration are distinct remedies, and CMS seeks the Department's disposition only as to the latter one. The Department is expressly not reviewing the Motion for possible extension of appellate rights, as Altresco indicates. Second, the language of G.L. c. 25, § 5 imposes no express limits on the Department for waiving a late-filed motion for reconsideration, which if granted, would be reviewed by the Department; rather, it primarily addresses the law governing appeals to the Supreme Judicial Court. We note in this regard that the Department's regulations, 220 C.M.R. § 1.11(11), permit extensions of the judicial appeal period upon a showing of good cause. Consequently, we do not find that the Department lacks jurisdiction to waive the deadline for a filing a motion for reconsideration.

Under the Boston Edison standard for good cause, the Department must first consider the statutory and regulatory requirements underlying the standard. Both G.L. c. 25, § 5 and 220 C.M.R. § 1.11(10), require filing for the respective remedy within twenty days of issuance of an order. As the Department noted recently regarding a similar twenty-day deadline, "[s]wift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders." Nunnally at 4 (1993).

Next, Boston Edison requires a balancing of the public interest, the interests of the appealing party, and the interests of other parties. Boston Edison at 4. As noted above, the Department recognizes a strong public interest in the finality of its orders. Nunnally at 5. The interest in achieving finality is especially strong in cases related to BECo's RFP 3,

which has a long and complex history of litigation before the Department. The interests of CMS and Altresco are necessarily competing, since both entered bids in RFP 3.

Boston Edison and Nunnally emphasize, in addition, that the Department's decision "be consistent with the public interest in the context of the facts of the individual case." Id. at 5. CMS explains that due to the departure of the attorney of record at the law firm representing CMS, it did not become aware of the Department's Order in its case until after the deadline for filing a timely motion for reconsideration. CMS confirms that the Department's Order was sent to CMS' attorney of record at the time of issuance. However, CMS did not notify the Department of a further change of counsel following the July 9, 1993 departure of its attorney. In short, CMS requests that good cause be found for what appears to be inadvertence and avoidable miscommunication. No other party or participant should bear the consequences for the ensuing lapse related to the reassignment of CMS' counsel. The opposite result would lend itself too easily to avoidable delays and possible prejudice. Accordingly, we find that CMS has failed to establish good cause for the Department to grant the Motion for Reconsideration Out-of-Time.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the motion of CMS Generation Company and Montvale Energy Associates, L.P. for reconsideration and for leave to file a motion for reconsideration out-of-time are hereby DENIED.

By Order of the Department,